



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

5636 Southern Boulevard
Virginia Beach, VA 23462
www.deq.state.va.us

W. Tayloe Murphy, Jr.
Secretary of Natural Resources

Robert G. Burnley
Director

Francis L. Daniel
Tidewater Regional Director
(757) 518-2000

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT WITH WELLINGTON, L.L.C. Registration No. VAR103223

SECTION A: Purpose

This is a Consent Special Order issued under the authority of §62.1-44.15(8a) and §62.1-44.15(8d) of the Code of Virginia, between the State Water Control Board and Wellington, L.L.C. for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in the Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in the Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order.
6. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
7. "VPDES Regulation" means 9 VAC 25-31-10 *et seq.* - Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation.
8. "VPDES General Permit Regulation" means 9 VAC 25-180-10 *et seq.* - General Virginia Pollutant Discharge Elimination System Permit Regulation for Discharges of Storm Water from Construction Activities.

9. "VPDES Permit" means General VPDES Permit No. VAR10.
10. "VWP Regulation" means 9 VAC 25-210-10 *et seq.* – Virginia Water Protection (VWP) Permit Program Regulation.
11. "VAC" means the Virginia Administrative Code.

SECTION C: Findings of Fact and Conclusions of Law

1. Wellington, L.L.C. owns and is constructing a residential and mixed use/commercial development located in James City County known as Wellington (hereinafter known as the "Subdivision"). Reportedly, the Subdivision will be constructed in ten phases. The Subdivision has a total land area of approximately 490 acres and total disturbed area of approximately 400 acres.

2. In response to a complaint, DEQ staff inspected the Subdivision on November 19, 2003 and observed that land disturbance activities were occurring at the site in Sections II and III of the Wellington Subdivision, as depicted on development plans dated March 28, 2001, and titled "Project No. 8223-06." DEQ records indicate that at the time of the inspection, Wellington, L.L.C. had not submitted a registration statement for coverage under the VPDES General Permit Regulation for land disturbances at the Subdivision.

3. DEQ received a registration statement from Wellington, L.L.C. for coverage under the VPDES General Permit Regulation on November 24, 2003. The registration statement indicated that construction activity at the Subdivision started in 2003. Coverage under the VPDES Permit became effective on December 9, 2003.

4. During the November 19, 2003 site visit DEQ staff also observed that substantial erosion had occurred at the Subdivision in association with land disturbing activities, resulting in discharges of measurable sediment deposits in the adjacent wetlands and in an unnamed tributary of France Swamp. The noted sediment areas were located in the vicinity of Wellesley Way and Attleborough Way.

5. DEQ conducted additional site visits on December 5, 2003, April 26, 2004, and June 1, 2004. During these site visits DEQ staff observed the extent of sediment deposition in the wetlands and the unnamed tributary that had occurred at the Subdivision.

a. On December 5, 2003 DEQ staff estimated that 1-3 inches of sediment had been discharged and deposited in the channel of the unnamed tributary in the vicinity of Wellesley Way. Inspection of the second impact area in the vicinity of Attleborough Way revealed that sediment was running off the construction site and discharging into neighboring wetlands. DEQ staff estimated that approximately 12 inches of sediment covered 15,000 square feet of wetlands in this area.

b. On April 26, 2004 DEQ staff observed sediment laden water in the unnamed tributary approximately 200 ft. downstream from the Subdivision's sediment basin, in the vicinity of Wellesley Way. In the vicinity of Attleborough Way, several silt fences were observed with accumulated sediments exceeding half the height of the silt fence. In this area,

DEQ staff estimated that approximately 12 inches of sediment had discharged into and nearly filled the unnamed tributary channel and approximately 6 inches of sediment had been distributed on the adjacent floodplain. Where the small unnamed tributary joined a larger tributary section, approximately 36 inches of sediment was observed in the unnamed tributary channel bottom. This channel was filled with sediment for a distance measuring a minimum of 100 feet.

c. On June 1, 2004 DEQ staff observed that sediment originating in part from the rear yard of Lot #62 (in the vicinity of Penzance Place and Downpatrick Way) had migrated across the sediment basin access road, over several rows of silt fence and straw bales and discharged into an area of wetlands. Sediment accumulation in front of the silt fences exceeded half the height of the barriers, and in several instances, overtopped the silt fence. Approximately 8-12 inches of sediment was observed in wetlands for a distance of approximately 250 feet downstream of the silt fence barriers. A soil sample taken approximately 200 feet downstream of the silt fences revealed approximately 8 inches of recently deposited sandy material over hydric soils.

6. DEQ staff estimates a total of 0.699 acres of wetlands and perennial stream channels were impacted by the sediment deposits at the Subdivision (0.349 acres in the vicinity of Attleborough Way, 0.156 acres in the vicinity of Downpatrick and Penzance Place, and 0.194 acres in the vicinity of Wellsley Way).

7. DEQ did not issue Wellington, L.L.C. a permit to fill wetlands at the Subdivision.

8. Wellington, L.L.C. did not notify DEQ of the above listed discharges and/or filling of wetlands.

9. DEQ staff conducted a VPDES Permit inspection at the Subdivision on May 12, 2004. The inspection revealed several deficiencies in compliance with the VPDES Permit requirements, including Wellington's failure to develop a Storm Water Pollution Prevention Plan and implement its associated operational controls (failure to document major grading activities, inspect disturbed areas of construction at least once every 14 calendar days, and identify contractors and subcontractors) and failure to construct and maintain erosion and sediment controls properly (silt fencing down or containing sediment exceeding half the height of the fence, curb inlet protection requiring sediment removal, slope drains without outlet protection, and stockpiles not properly stabilized).

10. DEQ issued Wellington, L.L.C. NOV No. W2003-01-TRO-002 dated February 2, 2004 advising of the observed wetland impacts and NOV No. W2004-05-T-0003 dated May 27, 2004 advising of the deficiencies in compliance with VPDES General Permit Regulation requirements.

11. Section 62.1-44.5.A of the Code prohibits discharges to State waters except in compliance with a certificate issued by the Board. Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part III.F. of the VPDES Permit prohibit discharges to State waters except in compliance with the VPDES Permit. Wellington, L.L.C. violated § 62.1-44.5.A of the Code by discharging sediment into State waters under conditions not authorized by the

Board. After the effective date of coverage under the VPDES Permit, Wellington, L.L.C. violated 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part III.F. of the VPDES Permit by discharging to surface waters at the Subdivision without complying with the storm water pollution prevention plan requirements of the VPDES Permit.

12. Section 62.1-44.5.B of the Code, Section 9 VAC 25-180-70 of the VPDES General Permit Regulation, and Part III.G. of the VPDES Permit require that any permittee who discharges or causes or allows a discharge of pollutants to State waters, that is not authorized by a certificate issued by the Board, notify the DEQ of the discharge promptly. Wellington, L.L.C. violated § 62.4-44.5.B of the Code, Section 9 VAC 25-180-70 of the VPDES General Permit Regulation, and Part III.G. of the VPDES Permit by failing to immediately notify DEQ of the discharges at the Subdivision.

13. Section Sections 62.1-44.5.A and 62.1-44.15:5.D. of the Code prohibit filling in a wetland except in compliance with a Virginia Water Protection Permit. Wellington violated Sections 62.1-44.5 and 62.1-44.15:5.D. of the Code by discharging into and filling wetlands at the Subdivision without a permit issued by the Board.

14. Section 9 VAC 25-180-60.A.1. of the VPDES General Permit Regulation requires facilities to submit a registration statement at least two days prior to commencing construction activities. Wellington, L.L.C. violated 9 VAC 25-180-60.A.1. by commencing construction activities at the Subdivision prior to submitting a registration statement to DEQ.

15. Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part II of the VPDES Permit require that the permittee develop and implement a storm water pollution prevention plan ("SWP3"). Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part II.D of the VPDES Permit require that the permittee construct and maintain erosion and sediment controls, document major grading activities, implement temporary stabilization practices, and inspect disturbed areas of construction at least once every 14 calendar days as provided for in the SWP3. Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part II.E. of the VPDES Permit require that the permittee identify contractors and subcontractors in the SWP3. Wellington, L.L.C. violated Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part II of the VPDES Permit by failing to develop and implement a SWP3 for the construction activity at the Subdivision.

16. Wellington, L.L.C. reports the problems associated with erosion at the construction site were exacerbated due to the frequent, often times intense, rain events, and the highly erodible sandy soils at the Subdivision.

17. Wellington, L.L.C. has implemented erosion and sediment control measures at the Subdivision including hiring personnel dedicated to install/maintain erosion and sediment control devices, placing sod on Wellington, L.L.C. owned home sites, encouraging builders and buyers to place sod on home sites, and offering home owners fiber matting at contractor's costs, among other things.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §§ 62.1-44.15(8a) and (8d), orders Wellington, L.L.C., and Wellington, L.L.C. voluntarily agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders Wellington, L.L.C., and Wellington, L.L.C. voluntarily agrees, to pay a civil charge \$20,000 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall include Wellington, L.L.C.'s Federal Identification Number and shall note on its face that the payment is being made in accordance with the requirements of this Order. Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer, Commonwealth of Virginia," delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Wellington, L.L.C., for good cause shown by Wellington, L.L.C. or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notices of Violation issued to Wellington, L.L.C. by DEQ on February 2, and May 27, 2004. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. This Order is made by agreement and with the consent of the parties, and does not constitute a finding, adjudication or admission of violation of any federal, state or local law, rule, or regulation or any allegations contained herein.
4. Wellington, L.L.C. consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Wellington, L.L.C. declares it has received fair and due process under the Administrative Process Act, Va. Code §§2.2 - 4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by Wellington, L.L.C. to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by

- the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
 8. Wellington, L.L.C. shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Wellington, L.L.C. shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Wellington, L.L.C. shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.Failure to so notify the Regional Director within three (3) days of learning of any condition above, which Wellington, L.L.C. intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.
 9. This Order is binding on the parties hereto; their successors in interest, designees and assigns, jointly and severally.
 10. This Order shall become effective upon execution by both the Director or his designee and Wellington, L.L.C. Notwithstanding the foregoing, Wellington, L.L.C. agrees to be bound by any compliance date, which precedes the effective date of this Order.
 11. This Order shall continue in effect until:
 - a. Wellington, L.L.C. petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
 - b. The Director or the Board terminates this Order in his or its whole discretion upon 30 days written notice to Wellington, L.L.C.Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Wellington, L.L.C. from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Wellington, L.L.C. voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of March 17, 2004.

Francis L. Daniel
Francis L. Daniel, Tidewater Regional Director for
Robert G. Burnley, Director
Department of Environmental Quality

Wellington, L.L.C. voluntarily agrees to the issuance of this Order.

By: [Signature]
Date: 11-19-04

Commonwealth of Virginia

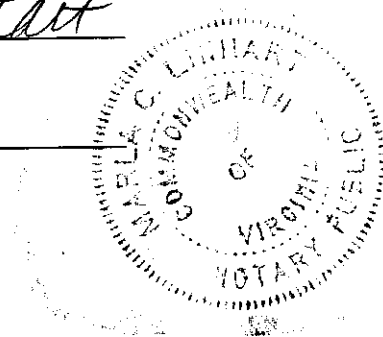
City/County of YORK, VA

The foregoing document was signed and acknowledged before me this 19 day of
November, 2004, by H. R. Ashe, who is

Pres. of Wellington, L.L.C., on behalf of the Company.
(title)

Marla C. Lyndot
Notary Public

My commission expires: May 31, 2004



APPENDIX A

Wellington, L.L.C.

1. ~~By January 1, 2005 Wellington, L.L.C. shall submit a storm water pollution prevention plan as required by Section 9 VAC 25-180-70 of the VPDES General Permit Regulation and Part II of the VPDES Permit~~

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2. By January 1, 2005 Wellington, L.L.C. shall evaluate and clearly flag all areas of sediment deposition in wetlands and other surface waters in the Subdivision, resulting from erosion and sediment transport due to construction activities, including but not limited to the deposits in the vicinity of Attleborough Way, Downpatrick and Penzance Place, and Wellsley Way as described in Section C. of this Order. Wellington, L.L.C. shall notify DEQ once flagging is completed and shall coordinate a site visit to review and obtain agreement from DEQ of the flagging of the deposition areas.

3. Within 30 days of obtaining DEQ approval of the flagged sediment deposition areas addressed in Item 1. above, Wellington, L.L.C. shall submit to DEQ a professional survey of the flagged sediment deposition areas. The survey shall overlay the Subdivision site development plan and shall depict the extent of sedimentation and existing elevations determined on 1-foot contours. The survey shall include a calculation of the actual square footage of the flagged wetlands and surface waters impacted by sediment deposits at the Subdivision.

4. Within 30 days of obtaining DEQ approval of the flagged sediment deposit areas addressed in Item 1. above, Wellington, L.L.C. shall submit to DEQ an approvable Site Monitoring Plan developed to monitor site conditions at all sediment deposition areas identified in Item 1. above. The plan shall provide, at minimum, for periodic photographic monitoring from permanent photographic monitoring stations and permanent sediment depth gauges as needed to monitor wetland and instream erosion and sediment transport and deposition in all impacted wetland and stream channel sections in areas depicted in the approved survey pursuant to Item 2. above. The DEQ shall approve, or modify and approve the Site Monitoring Plan.

5. Within 15 days of approval by DEQ, Wellington, L.L.C. shall implement the Site Monitoring Plan.

6. Within 30 days of DEQ approval of the Site Monitoring Plan and by the first day of each month thereafter, until stabilization of the surveyed sediment deposition areas is achieved, Wellington, L.L.C. shall submit to DEQ a report of the Site Monitoring Plan findings. This report shall also include the status of upland stabilization and construction activities potentially impacting the surveyed sediment deposition areas. For the purposes of this Order, DEQ shall determine when satisfactory stabilization of the surveyed sediment deposition areas is achieved at the Subdivision.

7. Within 60 days of receipt of written notification from DEQ, Wellington, L.L.C. shall submit to DEQ an approvable stabilization plan addressing excessive instream erosion and sediment transport in areas identified in the survey submitted pursuant to Item 2. above. Said stabilization

plan shall take into consideration expected post-development flow conditions and shall recommend corrective actions to establish a stable low-flow channel with floodplain connectivity and dissipate erosive forces. The DEQ shall approve, or modify and approve, the Stabilization Plan. Within 15 days of approval, Wellington, L.L.C. shall implement the Stabilization Plan.

8. All submittals and reports required by this Appendix A shall be mailed to:
Francis L. Daniel, Regional Director
DEQ, Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462